Filed 3/19/19 Monterey Financial Advisors, LLC v. Berghill, LLC CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MONTEREY FINANCIAL ADVISORS, LLC,

Plaintiff, Cross-defendant and Appellant,

v.

BERGHILL, LLC et al.,

Defendants, Cross-complainants and Respondents;

D.A. SMITH, LLC,

Cross-defendant and Appellant.

F075435

(Super. Ct. No. 2011721)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Gilmore Magness Janisse and David M. Gilmore for Plaintiff, Cross-defendant and Appellant, Monterey Financial Advisors, LLC, and for Cross-defendant and Appellant, D.A. Smith, LLC.

Herum\Crabtree\Suntag and Dana A. Suntag for Defendants, Cross-complainants and Respondents.

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Monterey Financial Advisors, LLC (MFA) entered into an option agreement with Berghill, LLC (Berghill) that required MFA to make an initial option payment by October 9, 2014, or the agreement would terminate. When MFA failed to make the payment by the deadline, Berghill treated the agreement as terminated. MFA, however, contended that one of Berghill's members agreed to extend the payment deadline and, on that basis, brought this action against Berghill and its members, Michael Berg and William Berryhill (collectively, respondents), alleging causes of action, among other things, for breach of contract, fraud and estoppel. Berghill learned during discovery that MFA had entered into an agreement which purported to assign a portion of the optioned interest to D.A. Smith, LLC (D.A. Smith). Berghill cross-complained against MFA and D.A. Smith for breach of contract and quiet title, and sought declarations that the option agreement had terminated and the assignment was of no force and effect.

Berghill moved for summary judgment on the complaint and cross-complaint, which the trial court granted. The trial court also granted Berghill's motion for terminating sanctions against D.A. Smith, finding it willfully failed to comply with its discovery obligations. MFA and D.A. Smith (collectively, appellants) appeal from the resulting judgment, arguing there are triable issues of fact that preclude summary judgment and the trial court abused its discretion in issuing terminating sanctions. Finding no merit to their arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Berghill is engaged in farming operations in San Joaquin and Stanislaus counties. MFA, whose sole member is a Kuwaiti citizen named Amr Al Jassim, is managed by William J. Barkett. Barkett is a "sophisticated investor" who has been a party to "many" lawsuits and involved in "millions of dollars" in litigation. Barkett graduated from law school in 1983, but is not a licensed attorney.

On May 15, 2014, Berghill and MFA entered into a "Purchase/Option Agreement and Joint Escrow Instructions," which granted MFA an option to purchase approximately

764 acres of real property and improvements in Stanislaus County that Berghill owned (the option agreement). To keep the option open, MFA was required to make a $150,000 initial option payment within 10 days after the close of the "due diligence period," as well as subsequent annual option payments. The option agreement defined the "due diligence period" as 90 business days after the "Agreement Date" of May 15, 2014. The option payments were nonrefundable, although they were applicable to the purchase price, and the option expired in 10 years. The purchase price for the property began at $31 million and increased incrementally over the 10-year option period.

For clarity on dates, the parties signed an "Escrow/Option Calendar," which lists the exact dates by which MFA was required to make the option payments (the calendar).[1] The calendar expressly states the last day for MFA to make the initial option payment was October 9, 2014 (the payment deadline).[2] Barkett retained a copy of the calendar after he signed it. The option agreement states "[t]ime is of the essence" and if MFA failed to timely make any option payment, the agreement would "terminate and the parties shall have no further obligation to the other."[3]

The option agreement includes a "Waivers" clause which states: "Any waiver, modification, consent or acquiescence with respect to any provision of this Agreement shall be set forth in writing and duly executed by or in behalf of the party to be bound thereby. No waiver by any party of any breach hereunder will be deemed a waiver of any other or subsequent breach."

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[1] Although the option agreement stated the "Agreement Date" was May 15, 2014, at the request of MFA's attorney, the calendar changed the "Agreement Date" to May 21, 2014.

[2] In his deposition, Barkett testified he did not have any reason to believe the October 9, 2014, date was incorrect.

[3] As required by the option agreement, MFA signed a quitclaim deed as to the property and deposited it into escrow. The quitclaim deed would be delivered to Berghill upon termination of the option agreement.

The option agreement also includes two clauses that state it is the parties' entire agreement. The first, entitled "Entirety of Agreement," states: "This Agreement is the entire Agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether oral or written, between the parties with respect to the matters contained within this Agreement." The second, entitled "Entire Agreement," states in all capital letters: "This agreement embodies the entire agreement between the optionee and optionor in connection with this transaction, and any oral or parole agreements, representations or warranties existing between the optionee and optionor relating to this transaction which are not expressly set forth herein and covered hereby shall be deemed canceled and of no further force and effect. The parties hereto intend that a court or finder of fact shall find that this agreement is the final expression of the parties' agreement with respect to the matters contained herein, that this agreement is intended to be the complete and exclusive statement of the terms of the agreement, and that the terms contained herein shall not be explained or supplemented by course of dealing or usage of trade or by course of performance."

The Partial Assignment

On May 27, 2014, MFA entered into an agreement with D.A. Smith, a Washington liability company whose only member is Danielle A. Smith (Smith), entitled "Partial Assignment of the Optioned Interest" (the assignment). The assignment states that in consideration of "Assignee" D.A. Smith providing to "Assignor" MFA a $60,000 payment and a "Steve Chamberlain prepared engineering report" by May 28, 2014, as well as an "additional payment" of $150,000 "on or before 75 calendar days from May 28, 2014 for direct application to the first year option payment as called out in" the option agreement, MFA "agrees to assign Ten Percent (10%) of the optioned interest" in the option agreement "contemporaneously with receipt of the May 28, 2014 payment." The assignment grants MFA the right to reacquire the optioned interest by either (1) paying D.A. Smith $140,000 within 45 days of May 28, 2014, and releasing D.A.

Smith of its "subsequent funding obligation(s)," or (2) paying D.A. Smith $440,000 within 150 days from May 28, 2014. If the optioned interest is not reacquired, D.A. Smith "shall commence to receive Ten Percent (10%) of all profits against a minimum of Five Percent (5%) of any gross sale price on each and every closing paid at the time of closing."

On June 18, 2014, Barkett sent Smith a letter amending the assignment to require D.A. Smith to advance $25,000 to MFA by June 20, 2014, with the "repayment terms for the advance [to] be the same as the executed agreement." The "second advance" of $150,000 was reduced to $125,000 and the due date changed to October 4, 2014, "which is five days before the payment is required by escrow."

The option agreement contains a specific provision allowing MFA to "assign its rights" under the agreement "provided that" (1) the assignee executes an assumption document agreeing to be bound by MFA's obligations under the agreement, (2) the assignee executes a quitclaim deed to Berghill and delivers it to escrow, (3) MFA gives notice of assignment to Berghill, and (4) the assignment does not relieve MFA of its obligations or liabilities under the agreement. Neither MFA nor D.A. Smith, however, gave Berghill notice of the assignment. In addition, D.A. Smith did not sign an assumption document or a quitclaim deed to Berghill. Berghill did not learn about the assignment until MFA produced a copy of it during discovery.

In his deposition, Barkett first testified D.A. Smith did not pay MFA anything in connection with the property, but he later testified it made the $60,000 payment on May 28, 2014, and provided the engineering report. Barkett told Smith not to make the $150,000 payment, as the initial option payment was not due until sometime in October.

In his declaration opposing the summary judgment motion, Barkett asserted the assignment was executed to provide security to D.A. Smith, which paid Barkett $60,000 as called for under the assignment, but had yet to make the second payment of $150,000. Barkett denied that he failed to comply with the requirements for assignment under the

option agreement, as he "was simply waiting until [MFA] received payment in full to notify [respondents]. Any other requirements were the responsibility of [D.A.] Smith as the assignee." Barkett declared that D.A. Smith did not advance the money under the assignment because of the dispute with Berghill, but he had "no reason to believe the funds were not available."

The Failure to Make the Initial Option Payment

At 9:06 a.m. on October 6, 2014—three days before the payment deadline—Barkett called Berg to request an extension.[4] Barkett told Berg he thought the payment was due "in the next few days," though he did not know "what the exact date was," and MFA was "prepared to exercise it," but he needed more time because his attorney was out of the country. Barkett wanted to wait for his attorney to return before making the payment as he "wanted to make sure I did everything right." In his deposition, Barkett conceded he "knew there was a time frame and there was a due diligence of things we had to do," but claimed he had "miscalculated the days."

Berg responded with words to the effect: "I'm sure it wouldn't be a problem." Berg thought there might be a 10-day grace period and he wanted to check the option agreement. After the call, Berg immediately checked the option agreement and determined there was no grace period— October 9, 2014, was the last day MFA could make the initial option payment. At 11:53 a.m. on October 6, 2014, Berg emailed Barkett the following: "I checked the agreement, and you must pay the option consideration through escrow by close of business on October 9, 2014. Otherwise, the option will terminate." Barkett claimed the email "was not surprising to" him, as he told Berg he

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4 In his declaration, Barkett stated he called Berg because he normally conducts business over the phone and most, if not all, of the business he had conducted with Berg over the years had been either over the phone or face-to-face. He claimed email was not their "normal mode of communication" and he was "an infrequent user of email and do not check it regularly."

"did not know the exact payment date from the agreement." About 25 minutes later, Barkett responded to Berg by email: "I need a couple week extension. You can increase the first payment if you need to. Attorney gets back next week. Sorry for the inconvenience." Barkett "did not think that a couple of weeks would be a problem considering the over $31 million deal we had going for the property."

The following morning, at 10:26 a.m. on October 7, 2014, Berg sent Barkett the following email: "We cannot grant any extension. You have had over 4 months to get this money together. If the option money is not paid timely in accordance with the agreement, then the agreement will terminate." Barkett did not respond to this email.

In his deposition, Barkett testified he did not have any reason to believe he did not receive the email on October 7, 2014, and while it was true he had four months to get the money together, he "had the money" and did not need an extension to get it.[5] Barkett further testified he received Berg's message before October 9, 2014, but he could not recall how many days before,[6] and MFA was prepared to make the $150,000 initial option payment "[a] few days after it was due." In his declaration, Barkett claimed that by the time he saw the email, "it was too late to make the payment by the date [respondents] contend it was due."

MFA did not make the initial option payment on October 9, 2014, or at any time thereafter. When MFA failed to make the payment, Steven D. Crabtree, a member of the firm representing Berghill (Herum\Crabtree\Suntag), sent a letter to the title company dated October 9, 2014, with a copy to MFA's attorney, asking it to terminate the escrow.

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5 Barkett also testified he did not believe the option agreement would terminate if payment was not timely made in accordance with the agreement, as he "didn't think from all the agreements that I've been involved in that the dates are that firm."

6 Barkett initially testified that Berg sent the message via text. When shown the emails, which MFA produced during discovery, Barkett testified he knew Berg "got back" to him in response to his request for an extension, but he did not know whether that was by text or email.

Crabtree stated that pursuant to the option agreement, MFA was to deposit its initial funds into escrow as of October 9, 2014, and if they failed to do so, the agreement "was to terminate effective as of the close of business on October 9, 2014, and escrow was authorized to release the quitclaim deed currently held by you on deposit to my client for them to record." Crabtree stated it was "our understanding that said funds have not been deposited timely. Accordingly, please consider the Agreement terminated per its terms and release the Quitclaim Deed previously deposited" for recording.

The next day, Crabtree emailed MFA's attorney, David Gilmore, with a copy of the notice sent to the title company attached, advising that the option agreement "has terminated in accordance with its terms in that [MFA] has failed to make their required initial deposit into escrow as of October 9, 2014." When the title company sent cancellation instructions for MFA's signature on October 14, 2014, Gilmore responded by email the same day that MFA declined to sign the instructions as it did not agree the escrow should be cancelled. Gilmore further stated that MFA would be filing a lawsuit; the escrow should remain open until the matter was resolved; MFA believed it continued to hold the option to purchase; and the title company could be exposed to liability should it take any action that interfered with MFA's option.

Barkett testified in his deposition that he did not have $150,000 in his possession on or about October 9, 2014, but he "could have very easily" by contacting Smith. When he signed the option agreement, he did not know who he would ask to fund the initial option payment, but it "wasn't that much money. I could have gone to a hundred people to do it. The person I had originally intended to do it backed out because the price changed so dramatically." Barkett later declared that if Berg had told him there would be no extension when he first asked, the payment would have been made, and he had no reason to believe the funds were not available.

Barkett has never provided or offered to provide Berg or Berryhill any evidence MFA had the ability to make the initial option payment, or offered to make the payment.

In addition, MFA has not shown, or offered to show, proof of funds or the ability to obtain funds to make any of the payments required under the option agreement.

This Lawsuit

MFA filed this action against Berghill, Berg and Berryhill on October 10, 2014. MFA's unverified complaint alleged eight causes of action: (1) breach of contract; (2) intentional misrepresentation; (3) fraud; (4) false promise; (5) promissory estoppel; (6) equitable estoppel; (7) injunctive relief; and (8) specific performance.

The complaint alleged that MFA previously owned the property, which Berg was "tenant farming," but due to a pending foreclosure sale, the parties agreed Berg would purchase the property at the foreclosure sale subject to a 10-year option for MFA to reacquire the property. Berghill purchased the property and the parties entered into the option agreement. Based on communications with respondents, MFA believed in good faith it had until October 19, 2014, to exercise the option, when the true date to exercise it was October 9, 2014, and when MFA informed respondents it intended to exercise the option on October 19, respondents reassured MFA that such additional time would be granted. Based on these assurances, MFA believed it had additional time to acquire the necessary funds to pay the option and reacquire the property, but respondents reneged on the extension agreement and denied MFA the right to exercise the option beyond October 9, 2014.

MFA alleged respondents breached the option agreement by refusing to allow MFA to exercise the option beyond October 9, 2014, despite the agreement the option could be exercised until October 19, 2014. With respect to the misrepresentation, fraud, and estoppel claims, MFA alleged respondents falsely represented or promised that MFA had until October 19, 2014, to exercise the option; in reliance thereon, it positioned its finances in such a way that it was not able to exercise the option until October 19; and had it known respondents did not intend to extend the option, it would have been able to exercise the option by October 9 and reacquire the property.

MFA sought to recover general and punitive damages; attorney fees and costs; temporary and preliminary injunctive relief enjoining respondents from engaging in the conduct that could harm MFA's rights in the property pending resolution of the case; and specific performance of the agreement to provide an extension of time to reacquire the property. MFA also recorded a lis pendens on the property.

Respondents filed an answer to the complaint and Berghill filed a verified cross-complaint against MFA. Berghill later filed a verified first amended cross-complaint against MFA and D.A. Smith, alleging a claim against MFA for breach of the option agreement, and claims against MFA and D.A. Smith for quiet title and declaratory relief that the option agreement had terminated and the assignment was of no force or effect. MFA and D.A. Smith filed answers to the first amended cross-complaint; MFA's answer was verified, while D.A. Smith failed to verify its answer.

The Motions for Terminating Sanctions

Beginning in October 2015, Berghill attempted to take the deposition of D.A. Smith's person most knowledgeable (PMK). Berghill noticed the deposition three times, but each time D.A. Smith's attorney stated the PMK was not available on the date set and requested another date. The deposition notices included requests for production of documents. Because MFA claimed it was relying on funding from D.A. Smith to make the initial option payment, the document requests required D.A. Smith to produce, among other things, documents that evidenced (1) D.A. Smith's payments, if any, to MFA, and (2) D.A. Smith's ability to fund the option payment or pay MFA pursuant to the assignment.

Following the third request to reschedule the deposition, Berghill agreed to reschedule it on the condition D.A. Smith and MFA signed a stipulation and order granting Berghill specific items of relief if D.A. Smith failed to comply with the deposition notice or document request contained therein. The stipulation required D.A. Smith to deliver documents responsive to the document request contained in the third

deposition notice by January 22, 2016, and appear at the deposition on February 8, 2016. If D.A. Smith failed to comply, D.A. Smith consented to the court "issuing an order striking [D.A.] Smith's Answer to the First Amended Cross-Complaint and entering judgment in favor of Berghill and against [D.A.] Smith as to each item of relief Berghill requests as to [D.A.] Smith … in addition to such other relief as Berghill may be entitled by law, including without limitation … terminating sanctions."

D.A. Smith failed to produce any documents by January 22, 2016. Dana A. Suntag, a member of Berghill's counsel of record, emailed D.A. Smith's attorney, David Gilmore, on February 4, 2016, asking him to email any responsive documents that day. Gilmore responded the following day that the only documents D.A. Smith had were the assignment, which was an exhibit to Barkett's deposition, and the one-page June 18, 2014, amendment, which was emailed to Suntag that day.

Suntag conducted the deposition of Danielle Smith, who was D.A. Smith's PMK, on February 8, 2016. No documents were produced at the deposition. Smith testified she did not read the document request attached to the deposition notice—while she saw the deposition notice when she received it, she spent less than five seconds glancing at it. Smith testified D.A. Smith made a loan to either MFA or Barkett personally. She did not know how much the loan was, but her "approximate guesstimate" was between $130,000 and $150,000. There were two payments—the first was between $100,000 and $125,000, and the second around $25,000. Smith deposited the money into an account number Barkett specified using paper checks from a bank account at either the Bank of America or Umpqua Bank, which was still open. She also had a safe deposit box at a Bank of America branch in her personal name. At the end of the deposition, Suntag stated he was keeping the deposition open so documents could be produced. He asked Smith to diligently look for responsive documents and produce them by the end of the week.

When no documents were produced, Suntag emailed Gilmore on March 11, 2016, asking for confirmation that the documents would be produced. Gilmore, however, failed to reply or produce any documents.

On July 1, 2016, respondents filed a motion for terminating and monetary sanctions as to D.A. Smith. Following argument on the motion, the trial court declined to order terminating sanctions, although it believed it was a close call. Instead, it ordered D.A. Smith to produce documents responsive to certain of respondents' document requests by September 2, 2016, including (1) all documents that evidenced or reflected any payments D.A. Smith made to MFA in connection with the assignment or property, and (2) all documents that evidenced or reflected D.A. Smith's ability to pay MFA.

The court expressly warned D.A. Smith it had "an affirmative duty to and must actively seek out copies of cancelled checks, bank account statements and phone records that are in its presumptive 'control' " as Smith testified. The court observed there had "been a troubling nonchalance displayed by" D.A. Smith and its attorney "with regard to the seriousness of" the discovery requests, and further warned that if D.A. Smith failed to produce the documents in question by the close of business on September 2, 2016, the court would "consider such failure [would] trigger[] the parties' stipulation entered into in January 2016," and the court would act accordingly. The court also awarded respondents monetary sanctions, which D.A. Smith was to pay by the close of business on September 1, 2016.

The court-ordered deadline passed without D.A. Smith producing any documents or paying the monetary sanctions, and without any communication from Gilmore. On September 6, 2016, Suntag emailed Gilmore, advising that due to noncompliance with the deadlines, Berghill intended to seek further appropriate relief and inviting Gilmore to contact him if he wished to discuss the matter. The next day, Gilmore called Suntag and told him he asked Smith to provide the documents, but she told him she did not have any,

and while he asked her to get the banking documents because they were available to her, she failed to respond.

On September 20, 2016, respondents filed a second motion for terminating sanctions, arguing sanctions were warranted because D.A. Smith expressly stipulated to the relief they were seeking, which it could have avoided had it chose to comply with the trial court's orders. D.A. Smith opposed the motion, arguing terminating sanctions were not appropriate because it did not willfully fail to comply with the court's order, as it made an effort to locate the documents, but did not find any.

In a declaration, Smith stated that to her recollection, there were only a couple documents drafted that set forth the terms of D.A. Smith's arrangement with MFA.[7] Smith admitted the documents produced at her deposition were "very minimal." While she indicated at her deposition she might have another file that related to the transaction, she searched for the file and could not locate it. Smith said she conducted further searches and engaged in diligent efforts to locate additional documents relating to the transaction, including bank statements that show the status of D.A. Smith accounts at the time, but could not find any. Smith did not recall any letters or emails between her and Barkett, but any emails were lost when the computer they would have been on crashed and she was unable to retrieve any information from the computer's hard drive. Since D.A. Smith did not retain hard copies of emails, once the hard-drive crashed, the emails, if any, were lost. Smith went to the bank to search a safe deposit box she maintained there for D.A. Smith, but it did not contain any records related to the arrangement she had with MFA and Barkett.

Smith moved to a new office well after the 2014 deal was made with MFA. Smith searched several file boxes and "material" she moved to that office, but was unable to

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[7] The trial court overruled respondents' objection to consideration of Smith's declaration because it was filed one day late.

locate any records relating to this transaction. Smith asked the bank where she maintained D.A. Smith's account if she could obtain copies of statements for the relevant time period, but as of the date of the declaration, she did not have anything from that bank. Smith claimed there were never many documents relating to the arrangement with MFA—most communications with Barkett were over the telephone and she did not keep copies of notes. There were a few written agreements she identified and produced at her deposition. Smith denied destroying or removing any documents that might relate to the transaction. She reviewed the list of the additional documents the court requested D.A. Smith produce and searched for the documents, but could not locate any further responsive documents.

On October 25, 2016, the trial court issued a tentative ruling stating its intent to grant the motion as to D.A. Smith, which became the final ruling when neither party requested oral argument. Consequently, pursuant to the January 2016 stipulated order and as a direct result of D.A. Smith's failure to comply with its discovery obligations, the court struck D.A. Smith's answer to the first amended cross-complaint and entered judgment in favor of respondents and against D.A. Smith as to each item of relief requested.

The Summary Judgment Motion

On August 1, 2016, respondents filed a motion for summary judgment on the complaint and first amended cross-complaint. As for the complaint, respondents argued MFA's breach of contract claim was meritless because MFA failed to make the initial option payment, or any subsequent payment, and the claim for specific performance failed because MFA did not have the ability to perform. Respondents argued the misrepresentation, fraud, false promise and promissory and equitable estoppel claims all failed because MFA did not actually rely on the alleged statement that MFA would have until October 19, 2014, to make the initial option payment. Respondents asserted it was undisputed Barkett asked Berg for an extension of time and within three hours, Berg sent

an email declining to grant the extension, and MFA did nothing in reliance during those three hours.

Berghill argued it was entitled to summary judgment on its cross-complaint for the same reasons it was entitled to summary judgment on the complaint: (1) since it was undisputed MFA defaulted on its payment and did not perform its obligations with respect to the assignment, it was entitled to judgment on its breach of contract claim and a declaration that the option agreement had terminated; (2) it had met all of the elements of a cause of action for quiet title; and (3) since it was undisputed neither MFA nor D.A. Smith complied with the requirements for an assignment under the option agreement, it was entitled to a declaration that the assignment was of no force or effect.

In opposition, MFA argued there were triable issues of material fact as to whether (1) there was a modification of the option agreement extending the payment deadline, (2) the termination of the escrow excused MFA's nonperformance under the modified agreement, and (3) the assignment was defective.[8] Specifically, MFA argued that by agreeing to an extension of the payment deadline, Berg either orally modified the existing contract or agreed to an entirely new and superseding contract, and it is the modified term, namely, the two-week extension, that MFA contends Berghill breached when it terminated the escrow on October 9, 2014. MFA further argued there was no evidence Barkett could not pay; to the contrary, he "very clearly stated" in his deposition that he was able to perform and declared there were several people besides D.A. Smith who would have invested in this opportunity. MFA asserted it did not fail to pay the option consideration; instead, its performance was excused by respondents' premature termination of the escrow.

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[8] The opposition was filed only on behalf of MFA. Since D.A. Smith failed to oppose the motion, Berghill asked the trial court to grant summary judgment against D.A. Smith on the first amended cross-complaint.

MFA further argued there was a question of fact regarding Barkett's reliance on Berg's oral extension agreement, as Berg's October 6, 2014, email was not an express repudiation of that agreement and Barkett did not see Berg's October 7, 2014, email in time to make the payment. MFA asserted it relied on the extension agreement, as well as the ongoing course of conduct between Barkett and Berg, to refrain from making the initial option payment by October 9, 2014, even though it had the funds to do so, and it was injured when Berghill terminated the escrow prematurely. MFA claimed Barkett would have simply paid the money before the time ran on the option had Berg expressly told him there would be no extension. As for the assignment, MFA argued its only obligation was to give notice of the assignment to the optionor, and it was reasonable for it to wait for full payment from D.A. Smith before doing so.

In reply, respondents argued (1) MFA mischaracterized Berg's October 6, 2014, email, as the email and Barkett's response shows Berg did not agree to an extension; (2) the alleged oral modification did not meet any of the requirements for modification; (3) MFA's claim it relied on some agreement to extend time fails because it did not do anything in reliance on the purported agreement before Berg made it clear an extension would not be granted; and (4) MFA failed to show how it intended to pay by October 9, 2014, as MFA did not produce evidence in opposition to the motion, or during discovery, that anyone agreed to provide the money or it had the ability to pay.

Following oral argument, the trial court granted the motion. The court found the undisputed material facts demonstrated not only that MFA, as the optionee, failed to "strictly perform" and "timely pay," but also that such failure was through no fault of Berghill, as Berghill "made it absolutely clear to [MFA] that the first option payment was due on October 9, 2014, and that no extension would be granted." The court also found MFA failed to prove in opposition to the motion that it ever had the ability to make the first option payment. The court noted that because of MFA's failure to timely pay, the option agreement terminated.

The trial court entered judgment on January 17, 2017, in favor of respondents on the complaint and cross-complaint. The judgment states the option agreement is terminated as of October 10, 2014, and both the agreement and the assignment are of no force and effect. In addition, title to the property was quieted in Berghill's name. In an order filed on February 3, 2017, the trial court granted respondents' motions to expunge the lis pendens and to enter judgment.[9]

DISCUSSION

I. The Summary Judgment Motion

A. Standard of Review

Summary judgment is proper only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f).)[10] The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to [that] cause of action …." (§ 437c, subd. (p)(2); see *Aguilar*, at p. 850.) The party opposing summary judgment may "not rely

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9 The notice of appeal specifies appellants are appealing from the January 17, 2017, judgment and February 3, 2017, order granting respondents' motion for entry of judgment, as well as the February 3, 2017, order granting Berghill's motion to expunge the lis pendens. An order expunging a lis pendens, however, is not appealable and can be challenged only by a petition for writ of mandate. (§ 405.39; see *Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, 577.) Before briefing, Berghill moved to dismiss the appeal from the order expunging the lis pendens on that basis. In its opposition, MFA conceded the order was not appealable, but objected to Berghill's request for fees and costs. We deferred ruling on the motion and advised respondents to address the issue in their brief. Appellants state in their opening brief that they have elected not to pursue the issue, thereby abandoning the appeal concerning the motion to expunge. As appellants have abandoned the issue, we grant Berghill's motion to dismiss the appeal from the order expunging the lis pendens.

10 Undesignated statutory references are to the Code of Civil Procedure.

upon the allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists." (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.)

We review the trial court's ruling on a summary judgment motion de novo and consider "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We liberally construe the evidence in favor of the party opposing summary judgment and resolve all doubts concerning the evidence in favor of that party. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) On appeal, the trial court's judgment is presumptively correct, and the appellant must affirmatively demonstrate error. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.)

B. Evidentiary Rulings

As a preliminary matter, we address the evidence that is properly before us on appeal. In the trial court, respondents objected to certain statements in Barkett's declaration concerning a course of conduct between himself and Berg, MFA's ability to make the initial option payment and D.A. Smith's ability to pay. With respect to the course of conduct, Barkett declared he had done business with Berg for years; if Berg needed an extension of time to perform, he would call and Barkett would agree, and if Barkett needed payments over time as opposed to a lump sum, Berg would accommodate his request; and he did not think Berg would refuse his request to modify the option agreement and "briefly extend the initial payment option date … given our course of conduct over the years." The trial court sustained respondents' objections to this evidence as irrelevant since the option agreement expressly states, "the terms contained herein shall not be explained or supplemented by course of dealing."

Regarding MFA's ability to pay, Barkett declared that when he called Berg to request the extension, MFA "was ready and able to pay the $150,000.00 payment." The trial court sustained respondents' objection on the ground the statement contradicted Barkett's deposition testimony that MFA would not have been prepared to make the payment until a "few days after it was due." The court also sustained an objection to Barkett's statement that he "did not make the necessary communications to have the funds transferred to escrow by the close of business October 9, 2014," because he relied on the representation that he had an extension, as conclusory and evasive, since no facts were provided as to what "communications" he would have made. Finally, the court sustained an objection to Barkett's statement that the escrow was terminated on the ground it was an inadmissible conclusion, since MFA's counsel had emailed the title company refusing to sign the cancellation instructions.

With respect to D.A. Smith's ability to pay, the trial court sustained objections to the following statements in Barkett's declaration: (1) D.A. Smith "was required to have the funds available to [MFA] by August 15, 2014. It was not required that she specifically deliver the funds by that date," as this contradicted Barkett's June 18, 2014, letter to Smith that D.A. Smith's payment was due on October 4, 2014; (2) "Smith informed me that she was able to pay the money," as inadmissible hearsay; and (3) "Even if Smith did not provide the funds when asked, I have several other investors that would have participated in this deal," as conclusory and irrelevant absent identification of the "other investors."

MFA relies substantially on this evidence in its appellate briefs, especially the evidence concerning the parties' course of conduct, but does not note the trial court's evidentiary rulings or challenge them. This was "doubly improper," as it gave the misleading impression the evidence had been admitted and waived or forfeited any argument the court's evidentiary rulings were erroneous. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368.) " 'Though

summary judgment review is de novo, review is limited to issues adequately raised and supported in the appellant's brief.' [Citation.] This principle applies equally to the trial court's evidentiary rulings." (*Ibid.*) Thus, where, as here, the appellant "does not attack the rulings on appeal, it has forfeited any contentions of error regarding them." (*Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41.) Accordingly, we do not consider the excluded evidence in assessing MFA's claims of error. (See *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1115 [declining to consider declaration the trial court excluded as speculative as support for appellant's claims of error where appellant failed to challenge trial court's evidentiary ruling on appeal].)

C. MFA's Claims for Breach of Contract and Specific Performance

An option to purchase real property is a contract in which the owner (the optionor) gives another (the optionee) the exclusive right to purchase real property in accordance with the option's terms. (*Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1049.) "[A]n option to purchase property is 'a unilateral agreement. The optionor offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn." (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 418.)

The optionor "binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option." (*Simons v. Young* (1979) 93 Cal.App.3d 170, 182.) An optionor, however, may waive or be estopped from asserting the strict requirements for exercise of the option. (*Id.* at pp. 178-179.) Because an option is a contract, it is subject to the general rules of contract law. (*Robert T. Miner, M.D., Inc. v. Tustin Ave. Investors, LLC* (2004) 116 Cal.App.4th 264, 270.)

In their summary judgment motion, respondents argued MFA could not prove an element of their breach of contract claim, namely, performance or an excuse for nonperformance.[11] According to the option agreement and calendar, the initial option payment was due on October 9, 2014. It is undisputed that MFA failed to make the payment by that date. Thus, according to the option agreement's express terms, the agreement terminated.

Moreover, there is no valid excuse for nonperformance. Barkett conceded in his deposition that MFA did not have the funds to make the initial option payment on October 9, 2014, when he testified that MFA was prepared to make the payment "[a] few days after it was due." As respondents point out, MFA had a little over four months to obtain the funds to make the payment and its stated reason for not making the payment on time—that its attorney was out of the country—is something MFA should have planned for.[12]

MFA contends Berghill made performance impossible because its attorney, Crabtree, sent a letter to the title company on October 9, 2014, asking it to terminate the escrow. MFA asserts that once the letter was sent, any further action would have been futile and even if MFA sought to perform at the last minute, it was not possible due to Berghill's anticipatory repudiation, citing *Henry v. Sharma* (1984) 154 Cal.App.3d 665, 670-672.

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11 To prevail on its breach of contract claim, MFA was required to prove (1) the contract's existence, (2) MFA's performance or excuse for nonperformance, (3) Berghill's breach, and (4) damages. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.) While MFA alleged a separate cause of action for specific performance, specific performance is simply an alternative remedy for breach of contract. (*Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1218, fn. 2.)

12 Barkett failed to conduct even a minimal amount of due diligence—he did not try to contact his attorney or the title company.

It is undisputed that Crabtree sent the October 9, 2014, letter to the title company "[w]hen [MFA] failed to make the Initial Option Payment." As Crabtree stated in the letter, the option agreement required MFA "to deposit their initial funds into escrow as of October 9, 2014"; if MFA failed to do so, the option agreement "was to terminate effective as of the close of business on October 9, 2014, and escrow was authorized to release the quitclaim deed"; and it was his "understanding that said funds have not been deposited timely." While the letter was sent on October 9, 2014, it was done so on the understanding that MFA had not deposited the initial option payment by the close of business that day. Had MFA deposited the payment on October 9, the title company presumably would have notified Crabtree that MFA had in fact complied with the option agreement's terms and the escrow would have remained open. There is no evidence MFA learned of the notification letter on October 9, 2014, and decided not to deposit the money based on it.[13] To the contrary, Crabtree notified Gilmore the following day that the option agreement had terminated because MFA failed to deposit the initial option payment into escrow as of October 9, 2014, and enclosed a copy of the notification letter.[14] The evidence simply does not support MFA's assertion that it would have been futile to make the initial option payment on October 9, 2014, or that respondents committed an anticipatory breach.

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[13] In their reply brief, appellants claim: "Barkett also noted that once that notice had gone to the title company it did not seem as if there was an option to pay." The cited testimony, however, does not support this claim. Instead, Barkett testified that since he received the "text message" from Berg that stated he would not give Barkett additional time to make the option payment, he had not offered to make the $150,000 payment because "[i]t didn't seem like it was an option."

[14] Moreover, while the notification letter was sent on October 9, 2014, it took five days for the title company to prepare cancellation instructions and once it sent them to Gilmore, he stated that MFA declined to sign them because MFA did not agree the escrow should be cancelled. Thus, as respondents point out, the escrow was not cancelled by October 9, 2014, or even October 14, 2014.

MFA contends there is a triable issue of fact whether "the course of conduct and actions of the parties" either modified the initial option payment deadline or precluded Berghill from relying on the October 9, 2014, deadline under the doctrines of waiver and estoppel. In particular, MFA contends that based on the course of conduct between Barkett and Berg, and Berg's statement that it would not be a problem to grant an extension, Barkett believed he had an extension of time to make the initial option payment and therefore did not take any steps to acquire the funds.

MFA asserts the option agreement may be modified by an oral agreement (Civ. Code, § 1698).[15] The option agreement, however, precludes oral modifications, as it requires all modifications to be in writing, executed by the party to be bound thereby. This does not mean, however, that the doctrines of waiver or estoppel could not apply here.

With respect to waiver, "notwithstanding a provision in a written agreement that precludes oral modification, the parties may, by their words or conduct, waive contractual rights." (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78 (*Wind Dancer*).) For example, a party may waive a timeliness provision (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1339) or a no oral modification provision (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 141). " ' "[T]he pivotal issue in a claim of waiver is the intention of the party who allegedly

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[15] Civil Code section 1698 provides: "(a) A contract in writing may be modified by a contract in writing. [¶] (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions. [¶] (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts."

relinquished the known legal right." [Citation.]' [Citation.] ' "The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]" [Citation.] Thus, " 'California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.' " ' " (*Wind Dancer*, at p. 78.)

The parties also "may, by their words or conduct, be estopped from enforcing a written contract provision." (*Wind Dancer*, *supra*, 10 Cal.App.5th at p. 78.) For example, " '[a] defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable.' " (*Id.* at p. 79.) The defendant need not have acted in bad faith or intended to mislead the plaintiff; it is enough that the defendant's conduct induced the plaintiff to refrain from instituting legal proceedings. (*Ibid.*) "As our Supreme Court has explained, ' " '[a]n estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. [Citation.] To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." ' " ' " (*Ibid.*, citing *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.)

While waiver and equitable estoppel ordinarily present questions of fact, they are questions of law when the facts are undisputed and only one reasonable inference or conclusion may be drawn from them. (*Wind Dancer*, *supra*, 10 Cal.App.5th at p. 78 [waiver]; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708 [equitable estoppel].)

MFA appears to be arguing that Berghill waived, or is estopped from enforcing, the payment deadline. With respect to waiver, the undisputed evidence is that after one

brief telephone call, in which Berg stated an extension would be no problem, Berg promptly emailed Barkett and told him the option would terminate if he did not make the payment by the payment deadline. When Barkett emailed back asking for a "couple week extension," Berg replied the following day that Berghill would not "grant any extension" and the agreement would terminate if the payment was not made in accordance with the agreement.[16] Berghill's words and conduct show it did not intend to waive the payment deadline.

With respect to estoppel, Berghill asserts that based on the parties' course of conduct over the years in which they granted extensions of time on similar agreements, and Berg's statement that it would not be a problem to grant an extension, a trier of fact could find Barkett reasonably believed MFA had been granted a short extension of time to make the initial option payment and therefore took no steps to acquire the funds. But the evidence shows that when Barkett asked Berg for an extension of time, Berg emailed Barkett within three hours and rejected Barkett's request for an extension. Barkett admits

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16 In the reply brief, MFA asserts it is disputed whether Barkett received the last email, as he testified "it went to the wrong email address" and he did not recall receiving it. In his deposition, Barkett claimed the email address Berg sent the first email to was not his email address, even though he produced the document to respondents in response to a court order, and admitted he may have seen the email before, but he remembered Berg sending him a text message. When shown the response to Berg's October 6, 2014, email asking for a "couple week extension," Barkett did not deny sending it. When asked if Berg sent the October 6, 2014, email in response to Barkett's phone call asking for more time, Barkett testified "[m]aybe yes. That could definitely be the case. I think you're right, I'm wrong," and he knew Berg got back to him, but he did not know in what form. When shown Berg's October 7, 2014, email stating that Berghill could not grant an extension, Barkett testified he did not have any reason to believe he did not receive the email the day it was sent. In his declaration submitted in opposition to the summary judgment motion, Barkett admitted Berg emailed him on October 6, 2014, that he responded via email the same day, and that Berg sent him the October 7, 2014, email, but by the time he saw the email, "it was too late to make the payment." Given Barkett's testimony and his declaration, MFA cannot claim that Barkett did not receive the last email. Regardless of whether Barkett read it, the email shows that Berghill did not intend to waive the payment deadline.

he received the email, but claims he believed Barkett was merely answering his question as to when the option agreement stated the payment was due. This belief was not reasonable given the following language in the email: "you must pay the option consideration through escrow by close of business on October 9, 2014. Otherwise the option will terminate." Based on this language, even if the parties had made informal modifications to prior agreements, it was not reasonable for Barkett to believe he had been granted an extension relating to *this* agreement. The unreasonableness of this belief became even clearer the following morning when Berg informed Barkett by email, in response to Barkett's repeated request for an extension, that Berghill could not "grant any extension."

Moreover, there is no evidence MFA did anything in reliance on Berg's statement that it would not be a problem to grant an extension between the time Berg made the statement and then withdrew it. Barkett admitted the withdrawal happened quickly, as he testified Berg said, "we're not giving you any extra time, and that was it. It was a—it was that fast." Barkett also admitted he did not have the money to make the payment, but needed to obtain it from another source. There is no evidence, however, that once Berg told him it would not be a problem to grant an extension, Barkett did, or did not do, something that affected his ability to obtain the funds and deposit them into escrow before Berg withdrew the extension. For example, there is nothing to suggest Barkett told a funding source the funds were no longer needed, but when Berg withdrew the extension, the source no longer had the money. To the contrary, Barkett testified he could have obtained the money by contacting Smith, but he did not ask her to pay the money before October 9, 2014, because he "didn't think it was necessary." Once Berg withdrew the extension, it was not reasonable for Barkett to do nothing.

In sum, the option agreement terminated by its terms when MFA failed to deposit the initial option payment into escrow by the close of business on October 9, 2014. Contrary to MFA's assertions, the payment deadline was not modified or waived, and

Berghill is not estopped from relying on it. Since MFA failed to perform, the trial court properly granted summary judgment on MFA's claim for breach of contract and, by extension, its claim for specific performance.[17]

D. MFA's Fraud and Estoppel Claims

MFA's claims for misrepresentation, fraud, false promise, and promissory and equitable estoppel are all based on the allegations that MFA relied on respondents' representation that MFA had until October 19, 2014, to exercise the option by "position[ing] its finances in such a way that it was not able to exercise the Option until 10/19/14." Claims for fraud and estoppel require actual reliance which causes the plaintiff to take a detrimental course of action (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [fraud and deceit]) or make "a complete and substantial change of position" (*De Zemplen v. Home Federal S. & L. Assn.* (1963) 221 Cal.App.2d 197, 207 [promissory estoppel]). (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766-767 [equitable estoppel].)

The fraud and estoppel claims all fail because MFA cannot show that it actually relied on Berg's statement that an extension would not be a problem. As we explained above, there is no evidence that once Berg told Barkett it would not be a problem to grant an extension, Barkett did, or did not do, something that affected his ability to obtain the funds and deposit them into escrow before Berg withdrew the extension. Without such

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17 Since specific performance is a *remedy* for breach of contract, not a cognizable legal *cause of action* for breach of contract, MFA's failure of its breach of contract claim means that its "cause of action" for specific performance likewise fails. (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 204 [noting general rule that " '[a] plaintiff may not obtain specific performance unless he has performed, or offered to perform, all of the conditions precedent required of him by the terms of the contract' "].) Therefore, we do not reach the parties' arguments pertaining solely to specific performance, namely, whether MFA had the ability to pay.

evidence, MFA cannot prevail on its fraud and estoppel claims; therefore, the trial court did not err in granting summary judgment on them.[18]

E. Berghill's First Amended Cross-Complaint

Berghill alleged four causes of action in its cross-complaint: (1) declaratory relief—that the option terminated because MFA failed to make the initial option payment; (2) MFA's breach of the option agreement by failing to make the initial option payment and assigning an interest in the option agreement contrary to the agreement's terms; (3) quiet title; and (4) declaratory relief—that the assignment was of no force or effect.

The trial court properly granted summary judgment in Berghill's favor as to each of these causes of action. As to the first cause of action, Berghill showed the option agreement terminated because MFA failed to make the initial option payment. MFA does not contend that Berghill was not entitled to a decree of quiet title in light of this.

With respect to the breach of contract claim, Berghill established MFA breached the option agreement by purporting to assign an interest to D.A. Smith without notifying Berghill of the assignment, or ensuring D.A. Smith signed an assumption document or a quitclaim deed. MFA contends the assignment is really just a security interest, as D.A. Smith only intended to loan the money to MFA. But the assignment does not state that it is a loan and it does not require repayment—instead, it gives MFA the option to repurchase the partially assigned interest in the option and, if it is not repurchased, D.A. Smith will retain its percentage of the optioned interest and receive a portion of MFA's profits. MFA asserts the option agreement's assignment provision does not apply to the

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[18] MFA also asserted a cause of action for "injunctive relief." "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168.) Since none of MFA's causes of action survive summary judgment, its claim for injunctive relief must also fail.

assignment of a partial interest, but the provision does not prohibit a partial assignment. By assigning an interest in the option, even a partial interest, MFA was required to at least notify Berghill. Its failure to do so is a breach of the option agreement.

Finally, Berghill was entitled to a declaration that the assignment is of no force and effect, and D.A. Smith has no interest in the property, given the failure to comply with the assignment and the termination of the option agreement.

II. Terminating Sanctions Against D.A. Smith

Appellants contend the trial court abused its discretion in issuing terminating sanctions against D.A. Smith because D.A. Smith complied with the trial court's prior order.

A. Standard of Review

A court, after notice and opportunity for a hearing, may impose sanctions for "misuse of the discovery process," which includes "[f]ailing to respond or to submit to an authorized method of discovery," and "[d]isobeying a court order to provide discovery." (§§ 2023.030, 2023.010, subds. (d) & (g).) Available sanctions include a terminating sanction in the form of orders striking the pleadings or rendering a default judgment against the offending party. (§ 2023.030, subd. (d)(1), (4).) Section 2025.450, subdivision (h) specifically authorizes a trial court to impose a terminating sanction under section 2023.030 if a party "fails to obey an order compelling attendance, testimony, and production" at a deposition.

We review the trial court's imposition of discovery sanctions for abuse of discretion. " ' "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply … and (2) the failure must be willful [citation]." ' " (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.) Willfulness in this context means a "conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance."

(*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 787-788, superseded by statute on another point as stated in *Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 444.) "Lack of diligence may be deemed willful in the sense that the party understood his obligation, had the ability to comply, and failed to comply. [Citation.] A willful failure does not necessarily include a wrongful intention to disobey discovery rules." (*Deyo v. Kilbourne*, *supra*, at p. 787.)

The propriety of terminating sanctions is determined by the totality of the circumstances, including the willfulness of the improper acts, the detriment to the propounding party, and the number of formal and informal attempts to obtain the discovery. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244-1247.) While a decision to order terminating sanctions should not be made lightly, "where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) Under this standard, trial courts have properly imposed terminating sanctions when parties have willfully disobeyed one or more discovery orders. (*Lang v. Hochman, supra,* at pp. 1244-1247 [discussing cases].) "The question before us ' "is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose." ' " (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1105.)

"When the trial court's exercise of its discretion relies on factual determinations, we examine the record for substantial evidence to support them. [Citations.] In this regard, 'the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact] ….' "

(*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390-391.) These principles encompass a review of a trial court's finding of willfulness. (*Id.* at p. 391.)

B. Willful Failure to Comply

Appellants argue there is insufficient evidence to support a finding that D.A. Smith willfully failed to comply with its discovery obligations, as Smith exercised due diligence when searching for responsive documents and produced all of the documents she found. We disagree, as substantial evidence supports the trial court's finding that D.A. Smith willfully failed to comply with its discovery obligations.

In January 2016, D.A. Smith entered into a stipulated order with Berghill, which required D.A. Smith to deliver documents responsive to Berghill's document request and, if it failed to comply, permitted the court to issue an order striking D.A. Smith's answer and entering judgment against it and in Berghill's favor. D.A. Smith failed to produce the documents by that date and produced only two documents before Smith's deposition. At her deposition, Smith admitted she only glanced at the document request attached to her deposition notice. She also testified she loaned MFA between $130,000 and $150,000 using paper checks from a bank account that was either at the Bank of America or Umpqua Bank. Respondents' attorney asked Smith to look further for responsive documents and produce them within a week, but she failed to do so.

When the trial court denied respondents' first motion for terminating sanctions, it ordered D.A. Smith to produce documents responsive to respondents' document requests, specifically noting D.A. Smith had an "affirmative duty" to "actively seek out copies of cancelled checks, bank account statements and phone records" in its presumptive control. D.A. Smith, however, did not produce the documents by the court-ordered deadline.

After respondents filed their second motion for terminating sanctions, Smith vaguely declared that she attempted to locate responsive documents, but could not find any. Smith claimed she searched for additional documents, including bank statements, but did not explain what she did to search for them, other than to state she searched D.A.

Smith's safe deposit box, as well as several file boxes and material she moved from her old office to her new one. Although Smith stated she asked "the bank where the account was maintained to see if I can obtain copies of any statements for that time period," Smith did not identify any details of her attempt to secure the statements, such as which bank she went to, who she spoke with and what she learned. Moreover, she completely failed to mention any attempts made to obtain copies of the cancelled checks or phone records.

Based on Smith's vague explanations, the trial court reasonably could find that Smith failed to comply with her discovery obligations and her noncompliance was willful. Therefore, the trial court did not abuse its discretion in ordering terminating sanctions in accordance with the January 2016 stipulation.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

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DE SANTOS, J.

WE CONCUR:

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DETJEN, Acting P.J.

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MEEHAN, J.